No. 88-1594

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
JANUARY TERM, 1989

DEBRA J. WINROD, et al., Petitioners,

v.

FORD MOTOR CO., et al., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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86 pp

QUESTIONS PRESENTED

Does the instant state court decision which reduces claimed attorney fees for a successful Magnuson-Moss plaintiff by 99.99% to $1.19 per hour by application of a proportionality rule, conflict with the attorney fee decisions of this court and operate to invalidate the remedies afforded by Magnuson-Moss in 15 U.S.C.A. §2310(d)?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Debra J. Winrod and Richard Winrod and the Respondents, Ford Motor Co., Graham Ford, Inc., and Ohio State Bank.

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IN THE SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1989

DEBRA J. WINROD, et al., Petitioners,

v.

FORD MOTOR CO., et al., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

Petitioners Debra J. Winrod and Richard Winrod respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in the above entitled proceeding on December 14, 1988.

OPINIONS BELOW

The Supreme Court of Ohio overruled the Motion to Certify the Record from the Ohio Tenth District Court of Appeals

without an opinion. The opinion of the Ohio Tenth District Court of Appeals is set forth in Appendix 4 attached hereto.

JURISDICTION

The jurisdiction of this court to review the judgment of the Ohio Supreme Court is invoked under 28 USC §1257.

STATEMENT OF THE CASE

Debra J. Winrod purchased a new Ford Escort from dealer Graham Ford, Inc. at a purchase price of $7,367.37. She paid $517.37 down, leaving an unpaid balance of $6,850.00 which was financed through Ohio State Bank. Mrs. Winrod revoked acceptance of the automobile, offered to return the automobile to dealer, and requested voluntary cancellation of the Promissory Note and Security Agreement. When the requested relief was not forthcoming, Mrs. Winrod attempted to obtain relief through the Ford Consumer Appeal Board which proved fruitless.

Mrs. Winrod then filed suit in Franklin County, Ohio Court of Common Pleas with a seven-count Complaint joining manufacturer Ford Motor Company, dealer Graham Ford, Inc., and Ohio State Bank,

the financer. The Complaint sought relief pursuant to the Magnuson-Moss Act, 15 U.S.C.A. §2301, et seq., and contained other claims for relief. Trial was had to a jury in 1987. A plaintiff's verdict resulted, granting rescission of the Purchase Contract and cancellation of the Promissory Note and Security Agreement.

Thereafter, Plaintiffs filed a petition for fees, costs and expenses which contained a detailed itemization of attorney time according to hours expended plus time for legal assistants, secretarial time, lawclerk research time, expenses paid by plaintiffs' counsel, expert witness fees, court reporter expenses, automobile storage expenses, and other miscellaneous expenses. The fee petition illustrated 146.40 hours for the attorney and $1,957.49 of other expenses. Plaintiffs called an experienced consumer attorney as an expert

witness on fees; he testified that the value of the attorney services was $20,518.49. A supplemental fee petition was filed by plaintiffs to claim fees and expenses for preparation and presentation of the fee petition. This included 10.8 hours for plaintiffs' counsel's time and $1,654.90 for expenses, including the expert witness fee.

The trial court ruled that plaintiffs were entitled to the sum of $3,800.00 for costs and expenses. No rationale or explanation for the award was stated in the decision. Deducting the expenses ($1,957.49 plus $1,654.90) from the fee and expense award, the sum of $187.21 remains to compensate plaintiffs' attorney. This amounts to a reduction of the fee request by 99.99% and reduces plaintiffs' counsel's compensation to $1.19 per hour.

The matter was then taken to the Ohio Tenth District Court of Appeals, which affirmed the expense award of the trial court, finding there to be no abuse of discretion. The appellate court expressly based its finding of no abuse of discretion on proportionality. The gist of the Court of Appeals decision is found in one sentence where Judge Strausbaugh said, at page 6, "Certainly, the fee requested should relate to the amount recovered in the principal action."

This decision was appealed to the Ohio Supreme Court on a Motion to Certify the Record. The Motion to Certify was overruled without opinion.

REASONS FOR GRANTING THE WRIT

The proportionality doctrine applied by the Ohio Appellate Court in affirming the trial court's award of attorney fees to a successful Magnuson-Moss plaintiff which reduced the attorney fees claimed by 99.99% is in conflict with this court's decisions in City of Riverside, et al., v. Santos Rivera, et al., 477 U.S. 561, 106 Sup. Ct. 2686, 91 Law. Ed. 2d 466 1986, and Hensley, et al., v. Eckerhart, et al., 461 U.S. 124 103 Sup. Court 1933 76 Law. Ed. 2d 40 1983, and operates to invalidate 15 U.S.C.A. §2301, et seq., in Ohio by depriving consumer plaintiffs of effective and competent counsel to represent them in litigation against manufacturers to enforce their warranty remedies.

• • •

Debra J. Winrod found herself to be the owner of a "lemon" automobile which had been manufactured by Ford Motor Co., sold by Graham Ford, Inc., and financed by Ohio State Bank. Mrs. Winrod was unable to obtain correction of the problems under the warranty for the automobile.

Mrs. Winrod then sought relief through litigation brought under the Magnuson-Moss Warranty Federal Trade Commission Improvement Act against the manufacturer, the dealer, and the bank as financer. The purposes of the Magnuson-Moss Act were described in the Senate Committee Report, 83rd Congress, Report No. 93-151, page 6, as follows:

> "The warranty provisions of S. 356 are designed to meet four basic needs:
>
> (1) The need for consumer understanding,
> (2) The need for minimum warranty protection for consumer,
> (3) The need for assurance of warranty performance, and
> (4) The need for better product reliability."

The relief available for consumers under the Magnuson-Moss Act is found in 15 U.S.C.A. §2310(d). See Appendix 1. An important part of the relief available is that which is provided by 15 U.S.C.A.

§2310(d)(2), which provides that if the consumer finally prevails in an action, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses " * * * (including attorney fees based on actual time expended) determined by the court to have been reasonably incurred * * * " " * * * unless the court, in its discretion, shall determine that such an award of attorney fees would be inappropriate." The reason Congress included attorney fee and expense provisions as an important part of the relief available under Magnuson-Moss were elaborated upon at page 7 of the Senate Committee Report referred to above, as follows:

> "The third major problem concerning warranties confronting consumers today relates to warranty enforcement. Even in the relatively rare situation where the consumer fully understands the meaning of a warranty, and there has

been no disclaimer of the implied warranties, he frequently is in no better position because the warrantor does not live up to the promises he has made. Because enforcement of the warranty through the courts is prohibitively expensive there exists no currently available remedy for consumers to enforce warranty obligations. If warrantors who did not perform as promised suffered direct economic detriment, they would have strong incentives to perform. Therefore there is a need to insure warrantor performance by monetarily penalizing the warrantor for non performance -- and awarding that penalty to the consumer as compensation for his loss. One way to effectively meet this need is by providing for reasonable attorneys' fees and court costs to successful consumer litigants, thus making consumer resort to the courts feasible. It is hoped that by making court actions feasible, suppliers will be encouraged to develop workable informal dispute settlement procedures for the expeditious settlement of consumer complaints." (Emphasis added.)

This case represents a battle between Winrod, the purchaser of a low-cost Ford automobile; and the Ford Motor Co., one of the industrial giants of the world. It is unrealistic to suppose that a consumer who purchases a $7,000 automobile could afford to pay the tremendous cost of litigation required to enforce the warranty under Magnuson-Moss against such an industrial giant as Ford Motor Co. unless the consumer had available to him the remedy for recovering expenses and attorney fees which is provided by Magnuson-Moss. The scheme of the Magnuson-Moss remedy is to require the manufacturer to bear the cost of litigation by paying plaintiff's attorney fees and expenses as a means of penalizing the manufacturer for not abiding by the automobile warranty. Ford Motor Co. has the assets with which to purchase the quality

and quantity of legal services it desires to defend against Magnuson-Moss claims, and unless there is some equality provided for the consumer, there is no battle and no remedy. See Gorman v. Saf-T-Mate, Inc., 513 F. Supp. 1028.

The award of fees and expenses by the Winrod trial court is so miniscule as compared with the cost of preparing Plaintiffs' representation and presenting the necessary evidence on the merits as well as on the fee petition that it would discourage and dissuade attorneys from ever representing plaintiffs in such actions, without charging plaintiffs for the time and expenses involved. Obviously, plaintiff consumers cannot afford that representation to achieve the remedy. The effect of the trial court's fee and expense award in Winrod is to preclude plaintiffs from seeking and

obtaining a remedy under Magnuson-Moss in the State of Ohio.

The trial court made no explanation of its award. Neither did the trial court find that an award of attorney fees based on actual time expended would be inappropriate. It simply reduced plaintiffs' claims for attorney fees by 99.99%.

The Ohio Court of Appeals explained its affirmation of the trial court's award by expressly stating that the consumer plaintiffs' attorney fee award " * * * should relate to the amount recovered in the principal action." This court has rejected the doctrine of proportionality in similar attorney fee cases. The holding of the Ohio Court of Appeals in Winrod is in direct conflict with the holding of this court in Hensley v. Eckerhart, et al., 461 U.S. 124 103 Sup. Court 1933 76 Law. Ed. 2d 40 1983. This court said there

that the most useful starting point for determining the amount of a reasonable attorney fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Magnuson-Moss states that attorney fees should be based on actual time expended unless the court finds that such an award of attorney fees would be inappropriate. Thus, Magnuson-Moss says that if attorney fees are appropriate, then they should be based on actual time expended.

In City of Riverside v. City of Riverside, et al., v. Santos Rivera, et al., 477 U.S. 561, 106 Sup. Ct. 2686, 91 Law. Ed. 2d 466 1986, this court approved an award of attorney fees in the sum of $245,456.25 where the plaintiff's monetary award was only $33,350.00. Mr. Justice Brennan, at page 2694, expressly rejected the idea that fee awards should neces-

sarily be proportionate to the amount of damages that the plaintiff receives. At page 2695, Justice Brennan continued, saying that damage awards do not reflect fully the public benefit advanced by such civil rights litigation, that Congress did not intend for fees in civil rights cases to depend on obtaining substantial monetary relief, and that a rule which limited attorney fees to a proportion of damages would undermine Congress' purpose in enacting the legislation. Just as it was true in the civil rights case of City of Riverside v. Rivera, it is equally true in the Winrod case. The purpose of Magnuson-Moss is to induce manufacturers to abide by their warranties, and the public at large has an interest in such cases being prosecuted by individual consumer plaintiffs. The payment of attorney fees for consumer plaintiffs based upon actual time expended

is one of the coercive devices deliberately chosen by Congress to induce and persuade manufacturers to abide by their warranties.

There is conflict between state court decisions on attorney fees for Magnuson-Moss cases and the policy decisions announced by this court in Hensley v. Hensley v. Eckerhart and in City of Riverside v. Rivera. In Winrod, the Ohio Court of Appeals relied on Hanks v. Pandolfo (1982), 38 Conn. Sup. 447;450 A. 2d 1167, a decision from a Connecticut superior court. In the Hanks v. Pandolfo decision, the court held:

> " * * * The plain meaning of the language 'in its discretion' (15 U.S.C.A. §2310(d)(2)) contained in this phrase, when read together with the other language of the subsection, permits the court to exercise its judgment (1) to award no attorney's fees, or (2) to award attorney's fees based on time only, or (3) to award

attorney's fees pursuant to its discretion. * * *"
Id. at 1169-1170.

If the conflict which prevails as between the doctrine announced in City of Riverside v. Rivera by this court and the proportionality decisions such as are evidenced by Winrod is allowed to continue and to spread among the various jurisdictions of state and federal courts, rank confusion will result, and Magnuson-Moss will be rendered ineffective and useless in large segments of the nation. The decision of the Ohio Supreme Court in affirming Winrod by overruling the Motion to Certify renders Magnuson-Moss ineffective in Ohio.

CONCLUSION

Unless competent counsel can expect to receive reasonable compensation for representing consumer plaintiffs in Magnuson-Moss actions brought pursuant to 15 USCA §2301 et seq. to enforce manufacturers' warranties, Magnuson-Moss will have no efficacy or validity.

The rule of proportionality, i.e., the fee awarded must bear relationship to the monetary recovery of consumer plaintiffs, should be discarded in Magnuson-Moss actions as it has been in civil rights cases. Congress clearly intended that manufacturers be penalized for failure to abide by their warranties by being required to pay reasonable plaintiff consumer attorney fees.

A definitive attorney fee policy pronouncement from this court is required to

restore the efficacy of Magnuson-Moss in Ohio and to establish it nationwide. Without such policy pronouncement to establish uniformity throughout the nation, competent counsel is not and will not be available to prosecute Magnuson-Moss actions. In the absence of such pronouncement, uncertainty and conflict among the various states and federal courts will continue.

The Petition for Writ of Certiorari should be granted and the case heard on the merits to restore or establish Magnuson-Moss as an effective remedy nationwide against manufacturers who fail to abide by their warranties.

Respectfully submitted,

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Columbus, Ohio 43221
Attorney of Record

John W. Leibold
Attorney for Petitioners

APPENDIX 1

15 U.S.C. §2310(d) (in part):

"Civil action by consumer for damages, etc.; jurisdiction; recovery of costs and expenses; cognizable claims.
(1) Subject to subsections (a)(3) and (e), a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title (15 U.S.C., §2301, et seq.), or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal equitable relief --
(A) in any court of competent jurisdiction in any state or the District of Columbia; or
(B) in any appropriate district court of the United States, subject to paragraph (3) of this subsection.
(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate."

APPENDIX 2

IN THE COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO

Debra J. Winrod,
et al.,

Plaintiffs,

-vs- Case No. 86CV-02-1164

Ford Motor Company, Judge Reda
et al.,

Defendants.

JUDGMENT ENTRY

This case came on to be tried on the First, Third, Fifth, Sixth and Seventh Counts of the complaint of the plaintiffs, and upon the counterclaim of the defendant Ohio State Bank against the plaintiffs. The issues were submitted to a duly impaneled and sworn jury of eight. The verdict of the jury on the complaint was for the plaintiffs and against defendant Ford Motor Company, to grant plain-

tiffs rescission of the contract of purchase of the subject automobile; to award to defendants Graham Ford, Inc. or Ford Motor Company the sum of $1,175.00 for usage of the automobile by the plaintiffs; and, verdict in favor of the plaintiffs and against the defendant Ohio State Bank on the counterclaim of the Ohio State Bank.

In accordance with said verdict, it is therefore ORDERED by the court that the plaintiffs be awarded rescission of the contract of purchase of the subject automobile, being a 1985 Ford Escort, Serial Number 2FABP0420FB168492.

The court finds that the plaintiffs paid to the defendant Graham Ford, Inc. the sum of $517.37, which shall be a set-off against the sum of money awarded by the verdict for usage of the automobile. It is therefore ORDERED that judgment be

rendered in favor of defendant Graham Ford, Inc. and Ford Motor Company against plaintiffs for the sum of $657.63, being the net amount due for usage of the automobile.

It is further ORDERED that the counterclaim of the Ohio State Bank against the plaintiffs be DISMISSED and Ohio State Bank take nothing as against the plaintiffs.

It is further ORDERED that Ohio State Bank shall inform any credit reporting agency that the contract of purchase, installment promissory note, and security agreement are rescinded by order of court.

There being no just reason for delay, the matter of recovery by the plaintiffs from defendant Ford Motor Company of a sum equal to the aggregate amount of costs and expenses (including attorney fees based on actual time expended) will be

determined by the court upon a hearing to be set at some later time, pursuant to special assignment.

Costs to defendant Ford Motor Company.

REDA, J.

APPROVED:

JOHN W. LEIBOLD (LEI-01)

APPENDIX 3

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Debra J. Winrod, et al.,	:	
Plaintiffs,	:	
vs.	:	Case No. 86-CV-02 1164
Ford Motor Company, et al.,	:	Judge Reda
Defendants.	:	

DECISION AND ENTRY

Rendered this _____ day of April, 1988. Reda, J.

The Court has considered plaintiffs' petition for judgment for costs and expenses.

It is hereby ORDERED that plaintiffs are entitled to the sum of $3,800.00 for costs and expenses in the above cause of action.

Frank A. Reda, Judge

Copies to:

John W. Leibold
Attorney for Plaintiffs

Kenneth S. Blumenthal
Attorney for Defendant
Ford Motor Co.

APPENDIX 4

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Debra J. Winrod,	:	
	:	
Plaintiff-Appellant,	:	
	:	
Richard L. Winrod,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 88AP-453
	:	
Ford Motor Company, et al.,	:	Regular Calendar
	:	
Defendants-Appellees.	:	

O P I N I O N

Rendered on September 29, 1988

Mr. JOHN W. LEIBOLD,
for appellant.

PORTER, WRIGHT, MORRIS & ARTHUR
and MR. KENNETH S. BLUMENTHAL,
for appellee Ford Motor Company.

CARLILE, PATCHEN, MURPHY & ALLISON, MR. ALAN F. BERLINER and MR. JAMES R. MOATS, for appellee Ohio State Bank.

MR. DOMINIC J. CHIEFFO, for appellee Graham Ford, Inc.

APPEAL from the Franklin County Common Pleas Court. STRAUSBAUGH, J.

This is an appeal by plaintiff Debra J. Winrod from a judgment of the court of common pleas granting plaintiffs' request for rescission of the purchase contract for an automobile and cancellation of the accompanying promissory note. The only issue which plaintiff now appeals is the amount awarded by the court as fees, costs and expenses.

The facts in this case are undisputed. On February 3, 1985, plaintiff Debra Winrod ("plaintiff") purchased a new Ford Escort from defendants Ford Motor Company and Graham Ford, Inc., for

$7,367.37, which after the down payment was made left $6,850, which was financed through Ohio State Bank. Due to numerous problems which plaintiff incurred with the automobile, she consulted John W. Leibold in order to seek a remedy. Attorney Leibold then contacted defendants by letter revoking acceptance of the automobile and seeking cancellation of the note to which the defendants refused. Appeal was then taken to the Ford Consumer Appeal Board, an administrative review board offered by Ford Motor Company. The requested relief was not granted and plaintiff thereupon filed an action in Franklin County Court of Common Pleas. The litigation continued to a jury trial which lasted four days and resulted in a favorable verdict for plaintiff.

Thereupon, the trial court held a hearing to review plaintiff's requested

fee petition. In her petition, plaintiff sought reimbursement for 146.40 hours of attorney time, 115.75 hours of secretarial/ legal assistant time, 27.5 law clerk time, incidental expenses paid by counsel of $529.27 and other expenses amounting to $1,428.22. Thus the fee petition requested fees in the sum of $20,923.74. Thereafter, plaintiff filed a supplemental fee petition for an additional $2,391.15 for the time spent preparing for the hearing on the fee petition and securing counsel to present the fee petition. The supplemental fee petition amount resulted from 10.8 hours attorney time, 8.75 hours secretarial/legal assistant time, 5 hours law clerk time, $134.90 in miscellaneous expense and $770 for another attorney to present the fee petition to the trial court. Finally, $1200 was requested to be calculated with the prior amounts for

testimony given by plaintiff's expert on the calculation of fees and quality of work rendered. While plaintiff claims the total amount requested to be $24,655.14 there appears a discrepancy in this total. Adding together the fee petition, supplemental fee petition and cost for the expert witness, a more accurate total of these figures appears to be $24,514.89.

The trial court entered its decision on April 18, 1988 granting only $3800 for costs and expenses of the amount requested by plaintiff.

On appeal, plaintiff asserts one error for our review:

> "Where an automobile lemon law case is pleaded, tried and submitted to the jury on Magnuson-Moss (15 U.S.C., Section 2310, et seq), claims for relief, where the jury verdict and judgment thereon grants such relief, where thereafter the court hears and considers plaintiffs'

petition for fees and expenses which seeks $23,314.89, all based upon actual expenses and attorney time expended, the court erred to the prejudice of appellants in allowing only $3,800 for fees and expenses, where such allowance has no relationship to attorney time expended by plaintiffs' attorney."

Plaintiff points out that until Ohio enacted R.C. 1345.71 - 1345.76, effective October 22, 1987, the remedies available to consumers who had purchased defective automobiles were authorized pursuant to the Magnuson-Moss Federal Warranty Act. Under the Magnuson-Moss Federal Warranty Act, attorney fees should be awarded based on actual time expended in representing the consumer-client. The purpose for awarding actual fees in such cases is twofold: first, to encourage attorneys to represent consumers who purchase inexpensive automobiles and are not likely

to be able to afford the cost of litigation involving defective automobiles; and second, to require manufacturers of defective automobiles to bear the costs for failing to abide by the warranty agreements into which they enter. Thus, it is plaintiff's contention that the trial court disregarded the drafters' intent in enacting the Magnuson-Moss Federal Warranty Act in awarding only $3,800 in lieu of the amount requested by plaintiff which represented those attorney fees based on actual time expended in preparing for and litigating the present case.

Plaintiff argues that the amount awarded by the trial court was improper and in effect emasculates the intended purpose of encouraging consumers to seek redress when the recovery amount is normal. We disagree.

The Magnuson-Moss Federal Warranty Act provides in pertinent part:

> "If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosectuion of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate." Section 2310(d)(2), Title 15, U.S. Code. (Emphasis added.)

While this portion of the statute has relatively little attention, it is clear that the interpretation positioned by plaintiff that the language "including attorneys' fees based on actual time expended" requires the trial court to award fees in the amount requested is untenable.

The statute makes clear that the intent of the drafters was to award reasonable attorney fees. In plaintiff's brief,

she cites to the Senate Committee report on S. 356, 83rd Congress, Report No. 93-151, page 7:-

> "*** (T)here is a need to insure warrantor performance by monetarily penalizing the warrantor for nonperformance--and awarding that penalty to the consumer as compensation for his loss. One way to effectively meet this need is by providing for reasonable attorneys' fees and court costs to successful consumer litigants, thus making consumer resort to the courts feasible. It is hoped that by making court actions feasible, suppliers will be encouraged to develop workable informal dispute settlement procedures for the expeditious settlement of consumer complaints." (Emphasis added.)

Plaintiff directs our attention to this report for the purpose of indicating the intent to shift the consumer costs of litigation to the warrantor, however it is equally as clear that the intent of the drafters was to allow for reasonable attorney fees.

In Hanks v. Pandolfo (1982), 38 Conn.

Sup. 447; 450 A. 2d 1167, the Superior Court of Connecticut discussed the discretion with which the trial court is vested under the Magnuson-Moss Federal Warranty Act when granting attorney fees. In reviewing the language of the statute the court held:

> "The previous makes four points clear. First, the use of the permissive language 'may' instead of the mandatory language 'shall' connotes a clear option of the court to allow or not to allow the recovery of costs whether they be attorney's fees or otherwise. Morris v. Timenterial, Inc., 168 Conn. 41, 43, 357 A. 2d 507 (1975).
>
> "Second, if the court allows attorney's fees, such fees may be based on actual time expended. Thus, if the court elects to do so, it may totally exclude otherwise relevant considerations and base its fee calculation solely on the time expended, a procedure which presumably would not otherwise be permissible absent the specific language contained in this statute.

> "Third, whatever method of calculation is used, the costs must be 'reasonably incurred.'
>
> "Finally, the use of the mandatory language 'shall' in the last phrase of the provision connotes that a determination must be made that an award of attorney's fees is or is not appropriate. The plain meaning of the language 'in its discretion' contained in this phrase, when read together with the other language of the subsection, permits the court to exercise its judgment (1) to award no attorney's fees, or (2) to award attorney's fees based on time only, or (3) to award attorney's fees pursuant to its discretion. ***"
> Id. at 1169-1170.

We thus conclude that under the Magnuson-Moss Federal Warranty Act attorney fees are to be encouraged but are also to be left to the sound discretion of the trial court. On appeal, this court will review the trial court's decision with respect to the awarding of such fees as to whether there has been a clear abuse of discretion by the trial court. Several

factors should be taken into account to determine the reasonableness of attorney fees and one important factor is the result achieved at trial. Certainly the fee requested should relate to the amount recovered in the principal action. Cf. Wing Leasing v. M & B Aviation, Inc. (Mar. 15, 1988), Franklin App. No. 87AP-50, unreported (1988 Opinions 676).

In the present case, there was no monetary award in plaintiff's principal cause of action. The trial court granted rescission of the purchase contract for a $7,367.37 automobile and cancellation of the underlying promissory note of $10,080.18. In addition, the trial court required the plaintiffs to pay the defendants $1,175.00 to offset their use of the automobile. The verdict rendered by the trial court with respect to plaintiff's warranty action cannot be interpreted to

allow for reasonable attorney fees in an amount in excess of $23,000.00 as requested by plaintiff. We find the trial court did not abuse is discretion in awarding plaintiff attorney fees in the amount of $3,800.00.

We add that our opinion herein does not in any way reflect adversely upon the ability, integrity or endeavor of plaintiff's attorney.

Therefore, plaintiff's assignment of error is not well taken and is overruled. The judgment of the common pleas court is affirmed.

Judgment affirmed.

REILLY and BOWMAN, JJ., concur.

APPENDIX 5

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Debra J. Winrod,	:	
	:	
Plaintiff-Appellant,	:	
	:	
Richard L. Winrod,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 88AP-453
	:	
Ford Motor Company, et al.,	:	Regular Calendar
	:	
Defendants-Appellees.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on September 29, 1988, the motion to strike is overruled, and appellant's oral motion for leave to file reply brief is sustained, the

assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

STRAUSBAUGH, REILLY &
BOWMAN, JJ.

By /s/ Dean Strausbaugh
Judge

cc: John W. Leibold
Kenneth S. Blumenthal
Alan F. Berliner and
James R. Moats
Dominic J. Chieffo

APPENDIX 6

THE SUPREME COURT OF OHIO

COLUMBUS

1988 TERM

To wit: Dec. 14, 1988

Debra J. Winrod, et al.,	:	
Appellants,	:	
v.	:	Case No. 88-1833
Ford Motor Company, et al.,	:	E N T R Y
Appellees.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Franklin County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20,00, paid by
John W. Leibold.

(Court of Appeals No. 88AP453)

/s/ Thomas J. Moyer
Chief Justice

APPENDIX 7

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

DEBRA J. WINROD
10454 119th Ave., N.
Largo, FL 33543,

and

RICHARD L. WINROD
10454 119th Ave., N.
Largo, FL 33543,

Plaintiffs,

vs. Case No. _____

FORD MOTOR COMPANY
The American Road
Dearborn, MI 48121,

and

FORD MOTOR COMPANY
c/o C.T. Corporation
Systems
815 Superior Ave., N.E.
Cleveland, OH 44114,

and

GRAHAM FORD, INC.
770 West Broad Street
Columbus, OH 43222,

and

GRAHAM FORD, INC.
c/o Dominic Chieffo
820 South High Street
Columbus, OH 43215,

and

OHIO STATE BANK
946 S. Hamilton Road
Columbus, OH 43213,

Defendants.

COMPLAINT WITH JURY DEMAND

I. JURISDICTION

1. This is a civil action, involving the following claims:

(a) A claim arising under the Magnuson-Moss Act, 15 U.S.C. Section 2301, et seq.;

(b) A claim under Section 1302.27, Ohio Revised Code, and other pertinent portions of Chapter 1302, Revised Code;

(c) Claims arising under Section 1435.02, Ohio Revised Code, and other portions of Chapter 1345, Ohio Revised Code (Consumer Sales Practices Act);

(d) Claims under Section 109:4-3-13, Ohio Administrative Code;

(e) And claims under other pertinent statutes of the United States and the State of Ohio.

II. THE PARTIES

3. Graham Ford, Inc., is a Delaware Corporation with its principal place of business at 770 West Broad St., Columbus, Ohio.

4. Ford Motor Company is a Delaware corporation, doing business in Ohio with its principal place of business in Dearborn, Michigan.

5. Ohio State Bank is an Ohio corporation chartered under the laws of the State of Ohio.

6. Plaintiffs are residents of the State of Florida.

III. CAUSES OF ACTION

7. On the 3rd day of February, 1985, the plaintiff Debra J. Winrod purchased a

new 1985 Ford Escort automobile, Serial No. 2FABP0420FB168492 from the defendant, Graham Ford, Inc. for the sum of $7,367.37. The plaintiff traded in a 1982 Renault which the defendant Graham Ford, Inc. appraised at $2,680.94. The plaintiff paid the sum of $517.37 to the defendant Graham Ford, Inc., leaving an unpaid case balance of between $6,850 and $6,917.37. The defendant Graham Ford, Inc. wrote two different copies of the purchase contract, one of which is dated February 3, 1985, and which is attached hereto as Exhibit A, and one dated February 8, 1985, a copy of which is attached hereto as Exhibit B.

8. The plaintiffs, Debra J. Winrod and Richard L. Winrod, paid the remainder of the purchase price for the Ford Escort by signing on the 8th day of February, 1985, a discount note security agreement and disclosure statement wherein plain-

tiffs are described as the customer/ debtor and defendant Ohio State Bank is the lender. The total sale price is described in said discount note, security agreement and disclosure statement as $10,080.17. A copy of that instrument is attached hereto and marked as Exhibit C.

9. Pursuant to the express terms of the discount note, security agreement and disclosure statement (Exhibit C), and pursuant to 17 C.F.R. Part 433, which is known as the Holder Rule, Ohio State Bank is subject to all of the claims and defenses available to the plaintiff against Graham Ford, Inc. and Ford Motor Company.

10. The said 1985 Ford Escort was manufactured by Ford Motor Company. Ford Motor Company issued to plaintiffs a new car limited warranty, which provided that the selling dealer would repair, replace or adjust parts found to be defective in

factory materials or workmanship made or supplied by Ford, for a period of 12 months or 12,000 miles, among other provisions. A copy of the warranty issued by Ford Motor Company is attached hereto as Exhibit D.

11. After the plaintiffs took delivery of the automobile and commenced to use the automobile, the following defects and problems became apparent: It had a warped head on the engine; it had valve pinging and other noise; it continually and persistently stalled; it was hard to start; it had very little power; it had a bad fuel odor; the car stopped while being operated and would not run; the paint was rough, gritty and bubbly; and other defects were apparent.

12. The defects of the said automobile began to become apparent to plaintiffs on February 8, February 11, March 20, and March 26, and thereafter. The automobile

was impossible to operate at times, and dangerous to the operator and passengers when used, and subjected the operator of the vehicle to risk of loss for negligence and to risk of serious injury to themselves and their passengers.

13. The plaintiffs communicated with the officers and agents of defendant Graham Ford, Inc., who acknowledged in a written letter of May 25, 1985 that the automobile was a failure. The said letter is attached hereto as Exhibit E.

14. The plaintiffs informed Ford Motor Company of the defects of the automobile. The Ford Motor Company caused the matter to be referred to the Ford Consumer Appeals Board, which failed to recommend action to remedy the defects. The plaintiffs have exhausted their administrative remedies.

15. Prior to May 8, 1985, the automobile had been in the repair shop of

Graham Ford five times, and had been held there by Graham Ford for 21 days. By letter of May 8, 1985, acceptance of the automobile was revoked. A copy of that letter is attached hereto as Exhibit F. During the period from February 8, 1985 the plaintiffs were induced to retain possession of the automobile by the repeated assurances of the defendants that the defects would be repaired or corrected.

16. The defects in material, workmanship, operation, and appearance of the said automobile had not yet been repaired, replaced or adjusted, by the defendants. As of December 1, 1985, the 1985 Ford Escort automobile was in substantially the same condition as at delivery, except for its own defects, ordinary wear and tear, and alterations and damage made and done by the defendants. The automobile has been kept by the plaintiffs in an enclosed

safe storage since September 10, 1985, at a cost of $3.00 per day.

17. The breaches of warranty, both express and implied, by the defendants Ford Motor Company and Graham Ford, Inc. have caused the plaintiffs to incur automobile rental expenses, to borrow automobiles, to transport the Ford Escort back and forth repeatedly for repair, loss of wages, loss of opportunity, and other incidental and consequential damages, all to plaintiffs' damage in the sum of Five Thousand and no/100 Dollars ($5,000.00).

18. The said breaches of warranty by defendants Ford Motor Company and Graham Ford, Inc. have necessitated that plaintiffs employ legal counsel, at considerable expense, the full extent of which is as yet unknown.

19. The defendants have failed to acknowledge plaintiffs revocation of acceptance, and have failed and refused

to provide plaintiff with the remedies to which plaintiffs are entitled upon such revocation.

20. The defects found to exist and prevail in the said 1985 Ford Escort could not reasonably have been discovered by plaintiffs prior to plaintiffs' initially taking possession of the automobile.

21. The written promise of Ford Motor Company to repair, replace or adjust defects in material or workmanship at no charge to the plaintiffs formed a part of the basis of the bargain between plaintiffs and defendants.

IV. COUNTS OF ACTION

First Count

22. The plaintiffs incorporate by reference all of the allegations contained in paragraphs 1 through 21 above.

23. The defendants Ford Motor Company and Graham Ford, Inc., are merchants

with respect to automobiles under Section 1302.01, et seq., Ohio Revised Code.

24. The automobile purchased by plaintiffs was subject to the implied warranties of merchantability under Section 1302.27, Revised Code, running from Ford Motor Company and Graham Ford, Inc., to the benefit of the plaintiffs.

25. The defects described above rendered the vehicle unmerchantable, and rendered the vehicle unfit for the ordinary purposes for which such goods are used.

26. Defendants Ford Motor Company and Graham Ford, Inc., fail and refuse to adequately remedy the defects of the automobile, and the automobile remains in unmerchantable condition.

27. The plaintiffs are damaged by said breaches of implied warranty in the sum of Ten Thousand Eighty and 17/100 Dollars ($10,080.17), for breach of

warranty plus incidental and consequential damages already incurred and to be incurred in the future, the full extent of which is unknown at this time.

Second Count

28. The plaintiffs incorporate by reference all of the allegations contained in paragraphs 1 through 27 above.

29. The defendant Graham Ford, Inc., violated Section 1345.02, Revised Code and the rules adopted pursuant thereto when it represented to the plaintiff that the automobile had characteristics, uses and benefits which it does not have, and that the automobile was of a particular standard, quality and grade which it was not, for which the plaintiffs are entitled to recover three times their actual damages of Ten Thousand Eighty and 17/100 Dollars ($10,080.17), or Thirty Thousand Two Hundred Forty and 51/100 Dollars ($30,240.51).

Third Count

30. The plaintiffs incorporate by reference all of the allegations contained in paragraphs 1 through 29 above.

31. Debra J. Winrod is a consumer as defined in the Magnuson-Moss Act, 15 U.S.C.S. Section 2301, et seq.

32. The defendant Ford Motor Company is a supplier and warrantor as defined in the Magnsuon-Moss Warranty Act, 15 U.S.C.S. Section 2301, et seq.

33. The automobile described above is a consumer product, as defined in the Magnuson-Moss Warranty Act, 15 U.S.C.S. Section 2301, et seq.

34. The express warranty pertaining to the vehicle is a "written warranty" as defined in the Magnuson-Moss Warranty Act, 15 U.S.C.S. Section 2301, et seq.

35. The above-described actions constitute breach of the warranty by Ford Motor Company.

36. The automobile was manufactured after July 4, 1975.

37. Plaintiff Debra J. Winrod has been damaged in the amount of Ten Thousand Eighty and 17/100 Dollars ($10,080.17) as described above, and in addition, is entitled to actual attorney fees reasonably incurred in connection with the commencement and prosecution of this action, to costs of this action, including expert witness fees, and to all other legal and equitable relief as the court may deem proper.

Fourth Count

38. Plaintiffs incorporate herein by reference all of the allegations contained in paragraphs 1 through 37 above.

39. Graham Ford, Inc., has been guilty of unfair or deceptive consumer sales practices, in violation of Sections 1345.01 through 1345.13, Revised Code; has violated substantive rules describing

deceptive acts or practices in connection with consumer transactions as found in Chapter 109:4.3 of the Ohio Administrative Code (hereinafter designated "OAC"); and has committed an act or practice determined by a court of the State of Ohio to violate Section 1345.02 or 1345.03, Ohio Revised Code, after the decision containing the determination has been made available to public inspection.

40. Specifically, the defendant Graham Ford, Inc., has:

(a) Failed to provide the plaintiff with a copy of documents signed or initialled by plaintiff;

(b) Failed to inform the plaintiff that the automobile was dangerous to drive and that operating the automobile might cause great risk of serious bodily harm;

(c) Failed to provide the plaintiff with an itemized list of repairs performed or services rendered, including a list of

parts or materials and a statement of whether they are used, manufactured, or rebuilt and the individual performing the repair or service;

(d) Failed to return to the plaintiff any replaced parts, and failed to inform the plaintiff that any parts so replaced were intended for reuse or return prior to commencing the repair or service;

(e) Informed the plaintiff that there was nothing wrong with the vehicle and that the vehicle was in good operating condition, when in fact the defendant knew or had good reason to know that the vehicle was not in good operating condition, was unsafe to operate, and that continued operation would cause grave risk of serious physical harm to the plaintiff and her passengers;

(f) Represented to plaintiff that the automobile has performance characteristics, uses or benefits which it did

not have;

(g) Represented to the plaintiff that the automobile was of a particular standard, quality or grade which it was not;

(h) Represented that repairs or services had been made and performed when in fact, they had not;

(i) Failed to inform the plaintiff of the identity of the individual or firm performing services and repairs on the said automobile;

(j) Failed at the time of signing or initialling a document by the plaintiff to provide the plaintiff with a copy of the document, specifically, repair work orders;

(k) Failed to disclose to the plaintiff prior to the commencing of any repair or service that part of the repair or service would be performed by a person other than the defendant, Graham Ford, or its employees, and the warranty provided by

such repair person or company;

(l) Other violations.

41. The plaintiff is actually damaged in the sum of Ten Thousand Eighty and 17/100 Dollars ($10,080.18) and in addition is entitled to actual attorney fees reasonably incurred in connection with the commencement and prosectuion of this action, to costs of this action, and to treble damages in the amount of Thirty Thousand Two Hundred Forty and 51/100 Dollars ($30,240.51), in accordance with Section 1345.09(b), Ohio Revised Code.

Fifth Count

42. Plaintiffs incorporate by reference all of the allegations of paragraphs 1 through 41, above.

43. Since the time of the purchase of the automobile from Graham Ford, the defendant Ohio State Bank has acquired a lien interest on said automobile.

44. The existence of said lien creates the threat the Ohio State Bank will foreclose on its lien, repossess the said automobile, sell the automobile, obtain judgmentof deficiency against plaintiffs on the discount note, security agreement and disclosure statement, and file an adverse report with the Columbus Credit Bureau, which will detrimentally affect plaintiffs' credit.

45. Plaintiffs have no adequate remedy at law against this threat.

Sixth Count

46. Plaintiffs incorporate by reference all of the allegations contained in paragraphs 1 through 45, above.

47. Plaintiffs claim and maintain a lien on said automobile for the monies paid on the purchase price of said automobile, and for storage fees and other damages described above.

Seventh Count

48. Plaintiffs incorporate by reference all of the allegations contained in paragraphs 1 through 47, above.

49. The said automobile was in a defective condition at the time it left the hands of defendants Ford Motor Company and Graham Ford, Inc., to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to characteristics of the automobile. The automobile was not safe for normal handling, consumption or use. The automobile was sold without warning as to its defective condition. The said defendants Ford Motor Company and Graham Ford, Inc., are sellers engaged in the business of selling automobiles. The said automobile reached the plaintiffs without substantial change in its condition.

50. All of the above described has damaged plaintiffs in the sum of Ten Thousand Eighty and 17/100 Dollars ($10,080.17).

V. DEMAND

Wherefore plaintiffs demand the following relief:

1. On the first count, the plaintiffs demand that they be awarded a money judgment against the defendants Ford Motor Company and Graham Ford, Inc., jointly and severally for the sum of Ten Thousand Eighty and 17/100 Dollars ($10,080.17) plus consequntial and incidental damages the full extent of which are known at this time;

2. On the second count, plaintiffs demand that they be awarded a money judgment against the defendant Graham Ford, Inc. for the sum of Thirty Thousand Two Hundred Forty and 51/100 Dollars ($30,240.51), being treble the actual

damages;

3. On the third count, plaintiffs demand a money judgment against the defendant Ford Motor Company, for the sum of Ten Thousand Eighty and 17/100 Dollars ($10,080.17), plus costs, including attorney fees, witness fees, and all other costs reasonably and necessarily incurred in the prosecution of this action;

4. On the fourth count, the plaintiffs demand a money judgment against the defendant Graham Ford, Inc. for the sum of Thirty Thousand Two Hundred Forty and 51/100 Dollars ($30,240.51), being treble the actual damages, and in addition that plaintiffs be awarded costs including attorney fees incurred in connection with the commencement and prosecution of this action;

5. On the fifth count, plaintiffs demand a judgment against defendant Ohio State Bank declaring that plaintiffs are

not in default of the said promissory note and security agreement, that the plaintiffs rightfully and lawfully have withheld and refrained from making payments on said promissory note, and thirdly, that defendants obtain a permanent injunction restraining defendant Ohio State Bank from repossessing the said automobile, selling the automobile, obtaining a deficiency judgment, and from filing an adverse report with any credit reporting agency;

6. On the sixth count, plaintiffs demand a declaratory judgment declaring plaintiffs to have a valid first lien on said automobile, for the monies paid on the purchase price, for storage fees and for damages; and ordering said vehicle sold and the proceeds from the sale be applied first to the payment of plaintiffs' lien;

7. On the seventh count, plaintiffs demand a money judgment against the defend-

ants Ford Motor Company and Graham Ford, Inc. for the sum of Ten Thousand Eighty and 17/100 Dollars ($10,080.17), plus costs, and prejudgment interest.

Respectfully submitted,

/s/ John W. Leibold
JOHN W. LEIBOLD
Attorney for Plaintiffs
3006 North High Street
Columbus, Ohio 43202
(614) 267-5354

JURY DEMAND

Plaintiffs demand a trial by jury of the within cause.

/s/ John W. Leibold
JOHN W. LEIBOLD

NOTE: EXHIBITS OMITTED.

APPENDIX 8

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Debra J. Winrod,
et al.,

Plaintiffs,

-vs- Case No. 86-CV-02-1164

Ford Motor Company,
et al., Judge Reda

Defendants.

PLAINTIFFS' PETITION FOR JUDGMENT
FOR COSTS AND EXPENSES
WITH REQUEST FOR ORAL HEARING

I.

The plaintiffs, Debra Winrod and Richard Winrod, represent to the court that their aggregate amount of costs and expenses are as follows:

A. Attorney fees

1. Fees for plaintiffs' attorney, based on actual time expended and as itemized in Exhibit A attached hereto, 146.40

hours at $100 per hour = $14,640.00.

2. Legal Assistant/Secretary services, based on actual time expended and as itemized in Exhibit B attached hereto, 115.75 hours at $35 per hour = $4,051.25.

3. Law clerk research and other services, based on actual time expended and as itemized in Exhibit C attached hereto, 27.50 hours at $10 per hour = $275.00.

4. Incidental costs paid by attorney John W. Leibold and as itemized in Exhibit D attached hereto = $529.27.

Total of attorney fees and attorney expenses: $18,769.27.

B. Other expenses

1. Richard E. Turner, plaintiffs' expert witness fee, including trial and attendance at deposition called by and taken by defendant Ford Motor Company and as itemized in Exhibit E attached hereto: $571.42.

2. Mike Smith, expert witness for Ford Motor Company, statement for time consumed in deposition by plaintiffs and as evidenced by Exhibit F attached hereto: $160.00.

3. Court reporter bill for attendance at deposition of Michael Smith as evidenced by Exhibit G attached hereto: $24.00.

4. Court reporter bill for attendance at deposition of Carl Gregory, Steve Foulk and Bill Galloway of Graham Ford, Inc., as evidenced by Exhibit H attached hereto: $99.50.

5. Automobile storage charges as evidenced by Exhibit 1 attached hereto: $516.00.

6. Court reporter bill for attendance at deposition of Richard Turner and Michael Smith and six-page report of Michael Smith deposition, as evidenced by

Exhibit J attached hereto: $57.30.

Total of these expenses: $1,428.22.

GRAND TOTAL OF ALL FEES AND EXPENSES INCURRED BY PLAINTIFFS: $20,923.74.

II.

Settlement Attempts by Plaintiffs

Plaintiffs made several attempts to settle the dispute in efforts to avoid litigation and in efforts to settle the litigation, prior to the trial. These efforts included the following measures:

A. In the May 8, 1985 letter addressed to Graham Ford, Inc. (and a copy of which was sent by Certified Mail to Ford Motor Company), plaintiffs suggested that the matter be settled by: Winrods returning the automobile; Graham Ford refunding the $517.37 cash down payment; payment of $250.00 attorney fees; cancellation of the note and security agreement; and notification to the Credit Bureau of rescission. This letter with attached

photocopy of certified mail receipt by Ford Motor Company is attached hereto as Exhibit K.

B. September 5, 1985, plaintiffs in their consumer statement to the Ford Consumer Appeals Board again proposed settlement, the salient features of which were: refund cash paid on the auto; cancel the note and security agreement and make an accurate report to the Credit Bureau; pay attorney fees incurred to date (then $858.15); pay expert witness expense; and return the auto to Ford Motor Company. A copy of this statement is attached hereto as Exhibit L.

C. The law firm of Kincaid, Palmer & Randall representing the Ohio State Bank was fully informed of this proposal, and an itemized statement of attorney fees to that date was provided. This letter is attached hereto as Exhibit M.

D. On December 10, 1985, plaintiffs' counsel again wrote to the attorneys representing the Ohio State Bank, proposing a settlement, the salient features of which were to have plaintiffs sell the automobile, deduct the down payment made ($517.37), pay attorney fees, and remit the balance to Ohio State Bank. This letter is attached hereto as Exhibit N.

E. The matter was submitted to a mediator at Settlement Week December 5, 1986. This notice is attached hereto as Exhibit O. Ford Motor Company declined to acknowledge liability.

F. Plaintiffs' counsel made several oral requests directed to counsel for Ford Motor Company on dates for which no records exist but which occurred in the weeks just prior to trial. Counsel for Ford Motor Company disclaimed liability.

WHEREFORE, your petitioners Debra J. Winrod and Richard Winrod pray that the

court award judgment in their favor and against Ford Motor Company for the sum of $20,923.74 being a sum equal to the aggregate amount of costs and expenses including attorney fees based on actual time expended.

JOHN W. LEIBOLD (LEI-01)
Attorney for Plaintiffs
3006 North High Street
Columbus, Ohio 43202
(614) 267-5354

RECAPITULATION

Attorney fees	$14,640.00
Legal Assistant/Secretarial	4,051.25
Law clerk	275.00
Incidental costs	529.27
Litigation expenses	1,428.22
GRAND TOTAL	$20,923.74

Through April 15, 1987

NOTE: EXHIBITS OMITTED.

EXHIBIT 9

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Debra J. Winrod,
et al.,

Plaintiffs,

vs. Case No. 86-CV-02-1164

Ford Motor Company,
et al., Judge Reda

Defendants.

PLAINTIFFS' SUPPLEMENTAL PETITION FOR JUDGMENT FOR COSTS AND EXPENSES

The plaintiffs, Debra Winrod and Richard Winrod, represent to the court that since the preparation and filing of the original petition for costs and fees which was filed with the court on May 13, 1987, they have incurred costs and expenses as follows:

1. Fees for plaintiffs' attorney, John W. Leibold, based on actual time ex-

pended and as itemized on Exhibit K attached hereto: 10.8 hours at $100 per hour = $1,080.00.

2. Legal Assistant/Secretary time as itemized on Exhibit L attached hereto: 8.75 hours at $25 per hour = $306.25.

3. Expenses as itemized in Exhibit M attached hereto: $134.90.

4. Law clerk time as itemized on Exhibit M attached hereto: 5 hours at $20 per hour = $100.00

5. Robert D. Bergman, attorney fees in presenting fee petition as stated on Exhibit N attached hereto: $770.00.

Grand Total = $2,391.15.

6. In addition, plaintiffs' have found it necessary to engage Douglas Roberts, attorney, to testify about the reasonable value of attorney fees for actual time incurred. Mr. Roberts has not yet presented a statement for his services but will testify about the value of his services.

Respectfully submitted,

/s/ John W. Leibold
JOHN W. LEIBOLD (LEI-01)
3006 North High Street
Columbus, OH 43202
(614) 267-5354
Attorney for Plaintiffs

NOTE: EXHIBITS OMITTED.

IN THE SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1989

DEBRA J. WINROD, et al., Petitioners,

v.

FORD MOTOR CO., et al., Respondents.

CERTIFICATE OF SERVICE

I, Louis A. Jacobs, a member of the Bar of this Court, hereby certify that on this 11th day of March, 1989, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Kenneth S. Blumenthal, PORTER WRIGHT MORRIS & ARTHUR, 41 S. High St., Columbus, OH 43215; Dominic J. Chieffo, 820 S. High St., Columbus, OH 43206; and James R. Moats, CARLILE, PATCHEN, MURPHY & ALLISON, 366 E. Broad St., Columbus OH 43215, counsel for all the respondents herein. I further certify that all parties required to be served have been served.

Louis A. Jacobs

Louis A. Jacobs
Suite 102
3040 Riverside Drive
Columbus OH 43221
Attorney of Record

IN THE SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1989

DEBRA J. WINROD, et al., Petitioners,

v.

FORD MOTOR CO., et al., Respondents.

CERTIFICATE OF SERVICE

I, John W. Leibold, a member of the Bar of this Court, hereby certify that on this 30th day of March, 1989, three (3) copies of the Revised Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Kenneth S. Blumenthal, PORTER, WRIGHT, MORRIS & ARTHUR, 41 S. High St., Columbus, Ohio 43215; Dominic J. Chieffo, 820 S. High St., Columbus, Ohio 43206; and James R. Moats, CARLILE, PATCHEN, MURPHY & ALLISON, 366 E. Broad St., Columbus, Ohio, 43215, counsel for all the respondents herein. I further certify that all parties required to be served have been served.

John W. Leibold
3006 North High Street
Columbus, Ohio 43202
Attorney of Record

Supreme Court, U.S.
FILED
MAY 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1594

In The

Supreme Court of the United States

October Term, 1988

DEBRA J. WINROD, ET AL.

Petitioners,

v.

FORD MOTOR COMPANY, ET AL.

Respondents.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

THOMAS A. YOUNG
PORTER, WRIGHT, MORRIS & ARTHUR
41 South High Street
Columbus, Ohio 43215
Attorney of Record

KENNETH S. BLUMENTHAL
Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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No. 88-1594

In The

Supreme Court of the United States

October Term, 1988

DEBRA J. WINROD, ET AL.

Petitioners,

v.

FORD MOTOR COMPANY, ET AL.

Respondents.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

STATEMENT OF THE CASE

Petitioners filed this action in Franklin County, Court of Common Pleas on February 24, 1986. Petitioners alleged *inter alia* that Respondent Ford Motor Company failed to satisfy its duties under an express warranty given in connection with the purchase of a 1985 Ford Escort, and, thus, was in violation of the *Magnuson-Moss Warranty Act* 15 U.S.C. §2301, *et seq.* Petitioners purchased the automobile for $7,367.37 and financed the deal with a promissory note in the amount of $10,080.18.

The court found for the Petitioners and granted rescission of the Purchase Contract and cancellation of the Promissory Note and Agreement. The court further

ordered Petitioners to pay Respondent $1,175.00 for usage of the automobile against which was set-off the Petitioner's down payment of $517.37.

Thereafter, Petitioners filed a petition for costs and expenses in the amount of $24,665.14 of which $20,923.74 was claimed as attorneys' fees. The trial court awarded Petitioners $3,800.00.

Petitioners appealed the award to the Tenth District Court of Appeals, Franklin County, Ohio. In a decision rendered on September 29, 1988, the court of appeals held that the trial court was within its discretion to award Petitioners $3,800.00 as reasonable expenses.

Petitioners appealed the decision to the Ohio Supreme Court on a Motion to Certify the Record. Petitioners' motion was overruled without opinion.

REASONS FOR DENYING THE WRIT

A. THE TRIAL COURT'S DETERMINATION THAT $3,800.00 CONSTITUTED REASONABLE ATTORNEYS' FEES IN THIS CASE WAS WELL WITHIN THE DISCRETION GRANTED TO IT BY THE MAGNUSON-MOSS FEDERAL WARRANTY ACT.

The case below was relatively simple in nature; Petitioners claimed that the automobile that they purchased was defective and sought to have their Purchase Contract rescinded. The trial court determined that the contract should be rescinded and ordered Petitioners to pay $1,175.00 for their reasonable use of the automobile. No novel legal or factual questions arose during the course of the litigation. The parties did not conduct particularly

extensive discovery, nor were there any lengthy depositions. Furthermore, the trial court did not find that Respondent acted in bad faith and rejected Petitioners' contention that Respondent engaged in deceptive consumer practices in violation of The Ohio Consumer Sales Practices Act §1345.01, *et seq.* of the Ohio Revised Code.

For these reasons, Petitioners' request for nearly twenty-five thousand dollars in attorneys' fees is outrageous. In the itemized account provided with their request for expenses, Petitioners' counsel claim to have spent 146.40 hours of attorney time preparing for and litigating what was by any standard an extremely simple case. Petitioners' counsel further claim that their secretaries and legal assistants spent approximately 116 hours preparing materials for the trial and pretrial litigation of this case. Given that this case did not generate an inordinate amount of paper-work, it is difficult to imagine how so many hours could have been incurred. To place the amount for expenses claimed by Petitioners in proper perspective, one only need note that the automobile in question cost $7,367.37, and no monetary damages were awarded Petitioners as a result of their claims.

The trial court properly concluded that Petitioners' request for nearly $25,000 in attorneys' fees and expenses was entirely *unreasonable* given the nature of the case.

In reviewing the decision of the trial court, the Franklin County Court of Appeals held that the trial court was within its discretion to determine that Petitioners could not have reasonably incurred $25,000 in fees and expenses in litigating their claims.

In so holding the court stated that;

> "Several factors should be taken into account to determine the reasonableness of attorneys and one important factor is the result achieved at trial.
>
> * * *
>
> In the present case, there was no monetary award in the plaintiff's (sic) principal cause of action. The trial court granted rescission of the purchase contract for a $7,367.37 automobile and cancellation of the underlying promissory note of $10,080.18. In addition, the trial court required the plaintiffs to pay the defendants $1,775.00 to offset their use of the automobile. The verdict rendered by the trial court with respect to plaintiff's (sic) warranty action cannot be interpreted to allow for reasonable attorneys' fees in excess of $23,000.00 as requested by plaintiff."
>
> Appendix at A-19, A-20.

Thus, the decision of the court of appeals to affirm the award of the trial court was neither arbitrary nor unreasonable. Rather, the decision was soundly based on the facts of the case.

Petitioners contend that the trial court did not have the authority to reduce their fee request because under the Magnuson-Moss Warranty Act of 1975, 15 U.S.C. §2301, *et seq.*, fees awarded to prevailing parties must be based on actual time expended on the litigation. A cursory reading of the statute reveals that Petitioners' contentions are utterly without merit.

Section 2310(d)(2) of the Magnuson-Moss Act governs the award of attorneys' fees. The section provides in pertinent part that:

> "If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he *may* be

> allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses *(including attorneys' fees based on actual time expended)* determined by the court to have been *reasonably incurred* by the plaintiff for or in connection with the commencement and prosecution of such action, *unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.*" (Emphasis added.)

The language of this provision clearly indicates that an award of attorneys' fees under the Act is entirely within the discretion of the trial court. It is equally clear that in certain circumstances, even where the consumer prevails, the court has the power to decide that no attorneys' fees should be awarded. Nowhere does the provision grant the court power to award *unreasonable* attorneys' fees as a punitive measure against the losing party.

As the court of appeals pointed out in its decision, the legislative intent underlying §2310(d)(2) was to make it feasible for consumers to bring claims under Magnuson-Moss into court. In the Senate Committee Report, 93rd Congress, Report No. 93-151, page 7, the drafters of the Act stated that;

> "***(T)here is a need to insure warrantor performance by monetarily penalizing the warrantor for nonperformance – and awarding that penalty to the consumer as compensation for his loss. One way to effectively meet this need is by providing for *reasonable attorneys' fees and court costs* to successful consumer litigants, thus making consumer resort to the courts feasible. It is hoped that by making court actions feasible, suppliers will be encouraged to develop workable informal dispute settlement procedures for the expeditious settlement of consumer complaints." (Emphasis added.)

Although the award of attorneys' fees under the Act does function as a type of monetary penalty, its central purpose is to facilitate private consumer litigation under the

Act and to encourage the development of informal dispute settlement mechanisms. For this reason, the award must be limited to reasonable attorneys fees. The Act does not, as Petitioners apparently believe, provide a windfall to any attorney fortunate enough to procure a valid claim.

Petitioners argue that an award of attorneys' fees under §2310(d)(2) must be based upon the actual hours expended on the case multiplied by a reasonable hourly rate. As the court of appeals noted, however, the Act provides that those hours must have been reasonably incurred. In awarding attorneys' fees neither the trial court, nor the reviewing court are required to adhere slavishly to the amount requested by a prevailing party, merely because there exists documentation of the hours expended.

Other courts which have addressed the questions raised by §2310(d)(2) are in complete accord with the Franklin County Court of Appeals on this issue. See, e.g., *General Motors Acceptance Corporation v. Jankowitz*, 553 A.2d 1380 (N.J. Super. Ct. App. 1989); *Drouin v. Fleetwood Enterprises*, 209 Cal. Rptr. 623 (Cal. Ct. App. 1985).

In *Jankowitz, supra*, the court held that although a fee award under Magnuson-Moss may exceed the amount of recovery obtained at trial, the trial court has the discretion to determine that certain fees have not been reasonably incurred. The court stated that in making that determination the fact finder should consider the following factors: (1) the nature of the services rendered; (2) the amount of time actually expended; (3) the amounts involved; (4) the results obtained; and (5) the novelty or

difficulty of the issues involved in the case. *GMAC v. Jankowitz*, 553 A.2d at 1384.

In this case, the Franklin County Court of Appeals, after considering all of the relevant factors, determined that Petitioners' counsel could not have reasonably expended 46 hours in litigating what was essentially a very straightforward, even simplistic case. The court did not, as Petitioners suggest, rely upon the holding in *Hanks v. Pandolfo*, 447, 450 A.2d 1167 (Conn. Sup. Ct. 1982), for the proposition that the amount of recovery serves as a cap on the amount of attorneys' fees that can be awarded. Rather, the court determined that the amount of recovery should be considered, along with other factors, in assessing the amount of attorneys' fees that should be awarded in a given case.

This reasoning is well supported by the relevant statutory language and in complete accord with the approach adopted by other jurisdictions. Accordingly, there is no need for this Court to review the decision of the Franklin County Court of Appeals, and Petitioners' request for certiorari should be summarily denied.

B. THE DECISION OF THE FRANKLIN COUNTY COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

This Court has never addressed the issue of what constitutes "reasonable" attorneys' fees under the Magnuson-Moss Warranty Act, 15 U.S.C. §2301 *et seq.* The two decisions upon which Petitioners rely, *City of Riverside v. Santos Rivera*, 477 U.S. 561 (1986) and *Hensley v. Eckerhart*, 461 U.S. 124 (1983), deal exclusively with fee awards

pursuant to the Civil Rights Attorneys' Fees Act, 42 U.S.C. § 1988. For this reason, Petitioners' contention that the decision of the Franklin County Court of Appeals is in conflict with the principles established by this Court in *Riverside* and *Hensley* is utterly without merit. However, even a cursory reading of its decision rendered by the Franklin County Court of Appeals reveals that the decision is not in conflict with this Court's decisions in *City of Riverside* and *Hensley*.

Petitioners contend that the Franklin Court of Appeals utilized a "proportionality" approach in affirming the trial court's reduction of their fee request. More specifically, Petitioners argue that the court of appeals determined that an award of attorneys' fees must necessarily be proportionate to the amount of monetary damages recovered at trial. These arguments completely mischaracterize the court's decision.

The court of appeals did not hold that a fee award under Magnuson-Moss must be proportionate to the money damages awarded in the case. Rather, the court determined that the result obtained at trial is one of the factors to be considered in establishing a reasonable fee award. This determination is in complete accord with the guiding principles set forth in *Hensley* and *City of Riverside*.

In *Hensley*, this Court expressly approved the "lodestar" approach as being the best means of determining appropriate awards of attorneys' fees under the Civil Rights Attorneys Fees Act.

> The most useful starting point for determining the amount of a reasonable fee is the number of hours

> reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claims. Where the documentation of hours is inadequate, the district court may reduce the award accordingly. *The district court also should exclude from this initial fee calculation hours that were not "reasonably expended."* S Rep No. 93-1011, p 6 (1976). Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." (Emphasis Added).
>
> 461 U.S. at 433, 434.

Essentially, the "lodestar" approach requires a trial court to begin any determination of fee awards by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. Once this value is obtained, several factors should be considered in determining whether the amount must be reduced or enhanced. One important factor that may require the court to adjust the figure upward or downward is the results obtained at trial. *Hensley*, 461 U.S. at 434.

The lodestar test requires a court to engage in a two-tiered analysis of the amount requested. First, the court

must determine if the hours documented by the prevailing party were reasonably billed. In order to be "reasonably" billed, the documentation of hours must reflect sound billing judgment. Those hours which were not reasonably billed should be excluded from the amount requested. *Id.* The remaining value should then be adjusted to account for the difficulty or novelty of the legal issues involved in the case, and for the results obtained at trial. *Id.*

Pace Petitioners' arguments to the contrary, nowhere in *Hensley* is there support for the proposition that an award of attorneys' fees must be based solely on the actual time expended. Rather, this Court has repeatedly affirmed its commitment to the principle that in order to recover for the hours spent on a case there must be a demonstration that the time was reasonably incurred. *City of Riverside v. Santos Rivera*, 477 U.S. at 569.

In this case, the Franklin County Court of Appeals acknowledged implicitly that the time submitted by Petitioners did not reflect sound billing judgment. As the court noted, no reasonable attorney would bill his client $23,000 for a case that was worth at most $10,000 (the amount of the Promissory Note). Clearly, then, the reasoning adopted by the court in this case closely resembles the lodestar approached articulated in *Hensley* and *City of Riverside*. For this reason, Petitioners' argument that the decision of the Franklin County Court of Appeals is in conflict with this Court is without merit. Accordingly, Petitioners' request for certiorari should be denied.

CONCLUSION

Petitioner has failed to show any conflict between the decision of the Franklin County Court of Appeals and prior decisions of this Court. Petitioner has also failed to demonstrate any other basis for this Court to hear this case. Accordingly, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

No. 88-1594

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

DEBRA J. WINROD, et al.,

Petitioners,

v.

FORD MOTOR COMPANY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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Contrary to the assertions made in the Brief of Ford Motor Company, this case was neither easy nor simple. Counsel for Ford Motor Company intentionally caused the litigation to be more time consuming and more difficult than it need have been. For example, when Ford made its opening discovery request, Plaintiffs' counsel offered Ford counsel a copy of Plaintiffs' attorney's entire file, but Ford's attorney rejected it as being inadequate and insufficient.

Plaintiffs' counsel made frequent and sustained efforts to settle the case, but Ford denied liability until the end. Just before trial, Ford made a settlement offer which contained an inadequate attorney fee factor of approximately $1,000.

Ford asserts that the case was simple or "simplistic." Plaintiffs' Complaint was

15 pages long and contained seven counts. Plaintiffs' allegations and evidence were interwoven to present claims of violation of the Magnuson-Moss Act, violations of the Ohio Consumer Sales Practices Act, claims for relief under the Ohio Commercial Code (Uniform Commercial Code), and claims for equitable relief.

Ford asserts that the trial court concluded that Plaintiffs' request for " * * * nearly $25,000 in attorney fees and expenses was entirely unreasonable * * * " is simply not true. The trial court made no such observation. The trial court stated no reason for its award and no reason for reduction of Plaintiffs' request.

The Plaintiffs presented Attorney Douglas Roberts who was quite learned in the area of Magnuson-Moss and consumer complaints as a professional witness on fees. Mr. Roberts testified that the

value of the services of Plaintiffs' counsel through trial, plus expenses was $21,063.99. Additional time was required of Plaintiffs' counsel in preparing for and presenting the fee petition and the hearing thereon, and additional expenses included fees for the expert witness and fees for the extra counsel who had to be employed to present all of the fee petition testimony and evidence. Where Plaintiffs' counsel's fee is contested, Plaintiffs are entitled to recover fees and expenses incurred in presenting the contested fee matter. Delaware Valley Citizens Council for Clean Air, et al. v. Commonwealth of Pennsylvania, et al., (U.S.D. Ct. E.D. Pa., 1984), 581 F. Supp. 1414.

Ford presented no testimony or evidence of the value of Plaintiffs' counsel's services. Ford has relied totally upon an argumentive posture unsupported by any

evidence or testimony as to the value of Plaintiffs' counsel's services or the validity of the expenses incurred by Plaintiffs.

It is apparent that Ford has adopted a policy that it will make obtaining Magnuson-Moss relief so extraordinarily expensive to both the Plaintiffs and to Plaintiffs' counsel that Plaintiffs' counsel will not again undertake a Magnuson-Moss case. Competent counsel will not accept such cases unless there is reasonable prospect to be paid for their time and expense. Ford Motor Company has been successful in preventing Plaintiffs from obtaining a reasonable fee and expense award, and, if the Winrod decision stands, it will succeed in discouraging other Ohio consumers from availing themselves of the Magnuson-Moss remedy.

At page 10 of its Brief, Ford relates that, "The Franklin County Court of Appeals acknowledged implicitly that the time submitted by Petitioners did not reflect sound billing judgment." This non sequitur is totally without support in the record.

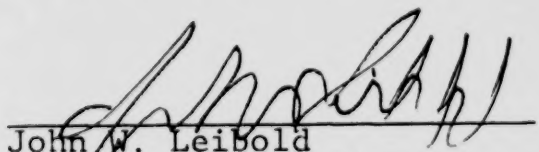
Ford misconstrues Hensley et al. v. Eckerhart, et al., 461 U.S. 124 103 Sup. Ct. 1933 76 Law. Ed 2d 40 1983, and City of Riverside, et al. v. Santos Rivera, et al., 477 U.S. 561, 106 Sup. Ct. 2686, 91 Law. Ed. 2d 466 1986, when at page 10, it says there is no support for the proposition that an award of attorney fees must be based solely on actual time expended. The time expended criteria is expressly stated in Magnuson-Moss at 15 U.S.C., §2310(d)(2).

Plaintiffs' Brief in this case illustrates the conflict between the Franklin County Court of Appeals Decision and City

of Riverside v. Santos Rivera, supra. City of Riverside says proportionality must not be used. Franklin County Court of Appeals in Winrod v. Ford says proportionality is the rule.

Petition for Writ of Certiorari should be granted to resolve this conflict, to re-establish the efficacy of Magnuson-Moss remedies in the State of Ohio as well as elsewhere throughout the nation, and to implement Congressional policy in enacting Magnuson-Moss. Without certiorari in this case, Magnuson-Moss is as dead as a door nail in Ohio.

Respectfully submitted,



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May 15, 1989